Osgoode Hall Law Journal

Volume 15, Number 1 (June 1977)

Article 2

Proposed Stage II Amendments to Canadian Combines Legislation--Bill C-42

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PROPOSED STAGE II AMENDMENTS TO CANADIAN COMBINES LEGISLATION — BILL C-42

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On March 16, 1977 Bill C-42 (the "Bill") was given first reading in the House of Commons. This represents the first legislative step in the enactment of the second important stage of amendments to the *Combines Investigation Act*[1] (the "Act") planned for this decade. On March 25, 1977 the Bill was given second reading and referred to the Standing Committee on Finance, Trade and Economic Affairs for study. That Commons Committee is expected to invite submissions and briefs from the Canadian public to assist it in its review of the Bill. The present government timetable for the Bill indicates that the Bill will not be debated in the House of Commons until the fall of this year.

The Bill follows fairly closely in time the enactment of the Stage I amendments[2] to the Act effective January 1, 1976. Both stages of amendments were initially proposed in June, 1971 as Bill C-256[3] but in view of the unfavourable public reaction to certain of the proposals contained in Bill C-256 the Minister of Consumer and Corporate Affairs (the "Minister") decided to divide the amendments into two stages, with the first stage dealing with the less controversial matters. The Stage I amendments included provisions that made certain trade practices subject to a civil review by the Restrictive Trade Practices Commission (the "Commission"), introduced new consumer protection measures, and extended competition law to cover service industries.

With respect to those aspects of Bill C-256 which were to be left for the second round of amendments, the Minister commissioned several studies and appointed an Advisory Committee to consider certain specific matters: "mergers, monopolization, price discrimination, loss-leader selling, rationalization and export agreements, and interlocking directorates."[4] The report[5] of the Advisory Committee (the "Skeoch-McDonald Report") was submitted to the Minister on March 31, 1976. It is evident upon reading the

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[1] R.S.C. 1970, c. C-23, as amended.

[2] S.C. 1974-75-76, c. 76.

[3] *Competition Act*, first reading June 29, 1971.

[4] Lawrence A. Skeoch with Bruce C. McDonald (in consultation with Michel Belanger, Reuben M. Bromstein and William O. Twaits), *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Minister of Supply and Services, Canada, 1976) at ii.

[5] *Id.*

Bill that its draftsmen have carefully considered the recommendations of the Skeoch-McDonald Report.

The Bill proposes substantial and significant amendments to the Act which affect the very structure and organization of the Canadian industrial community. This paper will summarize in detail the changes proposed by the Bill and comment on the proposals relating to mergers, monopolies, oligopolies and class actions.

A. SUMMARY OF BILL C-42

1. *General and Administrative Provisions*[6]

(a) Competition and the Competition Board

The Bill proposes to change the short title of the Act to the "Competition Act" and also proposes a new longer title that describes the purpose of the Act as being the promotion of competition and integrity in the market place. In addition, the Bill would replace the Restrictive Trade Practices Commission and the Director of Investigation and Research with the Competition Board and the Competition Policy Advocate, respectively.

The Bill proposes a preamble to the Act which could serve as a guide to the Competition Board (the "Board") in the exercise of its discretion. The preamble emphasizes that although the Act functions primarily to encourage competition, competition is only a means rather than an end in itself. According to the preamble the goals of the Act are to provide an economic environment

> that is conducive to the efficient allocation and utilization of society's resources, stimulates innovation in technology and organization, expands opportunities relating to both domestic and export markets and encourages the transmission of those benefits to society in an equitable manner.[7]

The preamble further states that in order to reach these goals Canada needs a flexible, adaptable and dynamic economy that will (i) assist talents and materials to move in response to market incentives; (ii) reduce or remove barriers to such mobility, except where such barriers are inherent in the achievement of economies of scale or other savings of resources; and (iii) discourage unnecessary economic concentration.[8] Competition is stated to be the means of ensuring the creation of such a dynamic Canadian economy.

The Bill proposes to transform the Commission into a quasi-judicial body.[9] This status is consistent with the Board's major role of reviewing trade practices, as introduced by the Stage I amendments and to be expanded under

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[6] To make this presentation simpler and more useful for future reference, the proposed section numbers for the amended Act will be used as if they were also the section numbers of the Bill.

[7] Preamble to Bill C-42.

[8] *Id.*

[9] Pursuant to the Bill, the Board will not possess the broad executive and legislative powers that are associated with the Federal Trade Commission in the United States.

the Bill. The Board will cease to be a hearing body for examining witnesses during an inquiry or a potential intermediate reviewing body of criminal infractions prior to their referral by the Director to the Attorney General of Canada. The Board's size will be increased to consist of between five and seven permanent members and not more than five associate members. Permanent members are to be appointed for terms of up to ten years, while associate members have a maximum term of three years. A panel of the Board need have only three members, one of whom must be a permanent member.

The Bill also relieves the Board of its responsibilities under the Act respecting investigations and research inquiries. These inquiries will be the responsibility of the Competition Policy Advocate (the "Advocate"). The Bill provides safeguards for anyone from whom the Advocate has obtained information through the use of his compulsory inquiry powers. Any such person would be entitled to receive a report and to apply for the appointment of a commissioner to reopen an inquiry.

The Bill contains a number of provisions respecting the gathering and use of evidence. Sections 10 and 11 of the Act will be amended to allow for the seizure and inspection of "other things" in addition to the items listed in those sections. Section 10.2 of the Bill provides for the obtaining and admissibility of computer data as evidence. Section 10.1 introduces a mechanism similar to the one contained in the *Income Tax Act*[10] to determine whether particular documents are subject to solicitor-client privilege.

(b) Special Remedies

The Bill amends section 29 of the Act to enable the Board to issue interim injunctions where a *prima facie* case has been presented to the effect that conduct is being engaged in that is contrary to a provision of part IV.1 of the Act and such conduct constitutes serious injury to competition or to the business of another person. Section 29.1 of the Act respecting interim injunctions which may be issued by a Court for offences under part V or section 46.1 of the Act would be amended by the Bill to minimize the requirements that must be satisfied in order for such an order to be issued. In particular, on an application pursuant to the section, only the threat of serious injury and the existence of a *prima facie* case of an offence need be shown.

The Bill would amend section 31.1 of the Act to extend the range of remedies available to those who have suffered losses because of a breach of a provision of part V or a failure to comply with an order of the Board. In addition to any right to sue for damages, a Court would be able to grant any other remedy or relief which the Court, by reason of its general jurisdiction, has authority to grant, including injunctions. Section 30 would be amended to allow a Court to issue a prohibition order at any stage before conviction in a prosecution for an offence under part V of the Act and at the same time to dismiss the prosecution. Such a prohibition order could only be issued with the consent of the accused and the consent of the Attorney General.

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[10] *Income Tax Act*, S.C. 1970-71-72, c. 63, as amended.

(c) Regulated Conduct

The Bill introduces sections 4.5 and 4.6 to clearly identify the interrelationship of the Act and the jurisdiction of regulatory agencies. The Bill exempts "regulated conduct" from part IV.1 of the Act and many of the provisions of part V of the Act. "Regulated conduct" means conduct that meets the following conditions:

(i) the conduct is specifically authorized by a public agency the members of which are not chosen by persons whose conduct will be regulated by such agency;

(ii) the public agency is empowered by legislation to deal with the conduct in the manner in which it is being regulated and the public agency has directed its attention to the regulation of the conduct; and

(iii) the application of the Act to the conduct would seriously interfere with the attainment of the primary regulatory objectives of the legislation pursuant to which the public agency is acting.[11]

Federal regulatory agencies are required by the Bill to exercise their powers in order to achieve their objectives, where possible, in the manner that is least restrictive of competition. Where they fail to exercise their discretion in this way, the Advocate may appeal the decision of such public agency. Section 27.1 of the Act, which was introduced in the Stage I amendments, will be amended to give the Advocate greater status to intervene before Federal boards, commissions or other agencies and greater rights to appeal or otherwise obtain a review of decisions of such agencies.

(d) Banks

Since the enactment of the Stage I amendments banks have been subject to the Act as a service industry. However, provisions in the *Bank Act*[12] have limited the extent to which the Act applies to banks. As a result, jurisdiction over banking has been shared by the Advocate and the Inspector General of Banks. The Bill proposes to repeal those sections of the *Bank Act* dealing with competition policy and thus make banks subject to the Act. However, special exemptions will exist. Section 4.3 of the Bill exempts from the merger provisions of the Bill and from section 32 of the Act those mergers of banks which the Minister of Finance considers desirable for the stability of the financial system and those agreements between banks which the Minister of Finance has approved for the purposes of monetary or financial policy. The Bill also exempts from the application of section 32 of the Act other agreements and arrangements between banks dealing with such matters as customer services, except where the agreement or arrangement has lessened or is likely to lessen competition unduly in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution, or, where the agreement has restricted or is likely to restrict entry into or expansion of a business in a market.[13]

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[11] Section 4.5(2).

[12] *Bank Act*, R.S.C. 1970, c. B-1, as amended.

[13] Section 4.3(2).

2. *Matters Reviewable by the Competition Board*

The Stage I amendments to the Act introduced a civil procedure of review for certain trade practices over which the Commission was empowered to issue corrective orders. The Bill proposes to expand the number of matters subject to such review and suggests a slightly revised procedure for conducting the review. Section 31.91 of the Bill provides that before the Advocate may apply to the Board for an order he must satisfy a member of the Board on an *ex parte* application that a *prima facie* case exists. Subsection 31.8(4) provides for the intervention of the Attorney General of a province on an application before the Board. Section 31.78 of the Bill permits representations to be made to the Board by persons, other than the parties, whose affairs are likely to be substantially affected by any order that the Board could make resulting from the review in question. Section 31.79 directs the Board to achieve its objectives "while interfering to the least possible extent with rights that any person to whom the order is directed or any other person affected by the order might have but for the order."

(a) Mergers

The Bill takes mergers out of the criminal sphere and renders them a reviewable trade practice subject to the authority of the Board. The Board will review those mergers that the Advocate considers reviewable. The definition of "merger" includes any acquisition or establishment of any control over or interest in a business of a competitor, supplier, customer or any other person. The merger section applies only

> to a merger that has not been completed before the coming into force of this section, that *lessens* or is likely to lessen, *substantially*, actual or potential competition
> (a) in a trade, industry or profession,
> (b) among the sources from which a trade, industry or profession obtains a product,
> (c) among the outlets through which a trade, industry or profession disposes of a product, or
> (d) otherwise than as described in paragraphs (a) to (c),
> and that, in the case of a horizontal merger, results or would be likely to result in the combined share of the merged persons and their affiliates immediately following the merger exceeding *twenty per cent* of any market.[14]

The Board must grant every person against whom an order is being sought by the Advocate an opportunity to present his case in a judicial setting. If the Board determines that a person is a party to a merger to which subsection 31.71(2) applies, then the Board may make an order "directing that person to dissolve the merger or dispose of assets designated by the Board in such manner as the Board prescribes, or directing him not to proceed with the merger, as the case may be.[15]

In determining whether a merger will substantially lessen actual or potential competition the Board is to be guided by fourteen factors. These factors include: the availability of competition from substitute products or

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[14] Section 31.71(2). [emphasis added]

[15] Section 31.71(3).

imports; any trends of concentration among parties dealing with the parties to the merger; size differentials among parties to the merger and their competitors; barriers to entry of new competitors; any history of growth by merger or of anti-competitive behaviour by the merger parties; whether an acquired party would have been a vigorous competitor or whether it was about to fail; any intention to reduce competition or control the market; any likelihood that sources of supply or sales outlets will be foreclosed or a new market can now be entered in a manner less restrictive of competition; the nature and extent of innovation; and the likelihood that competition will be stimulated.[16] Where the Board is satisfied that there is a high probability that a merger will bring about "substantial gains in efficiency, by way of savings of resources for the Canadian economy that are not reasonably obtainable by means other than the merger,"[17] the Board cannot prohibit or dissolve the merger. This protection for mergers that promise to be cost-efficient is inapplicable where the merger will or is likely to result in virtually complete control by the parties of a market.

In disposing of a case before it the Board is not restricted to the alternatives of allowing or disallowing a merger. The Board may provide that an order for dissolution shall not take effect if within the period of time set out in the order such action is taken to reduce or eliminate customs duties or other trade barriers, or some other action that is irreversible by the parties is taken that, in the opinion of the Board, prevents the merger from "lessening competition substantially."[18] A merger that is likely to result in "virtually complete control" must result in an order for dissolution pursuant to the Bill. However, if the merger will bring about substantial gains in efficiency, then the implementation of the order may be postponed by the Board on the condition that there be a reduction in customs duties or other trade barriers or an irreversible action that would serve to restore competition.[19]

The Bill further establishes that any review of a merger called for under the Bill is separate from and independent of any review called for pursuant to the *Foreign Investment Review Act*.[20] The Bill provides for the automatic forwarding to the Advocate of notices filed with the Foreign Investment Review Agency (the "Agency"). Subsection 31.71(11) provides that any evidence about the results of an application to the Agency is inadmissable in proceedings before the Board.

(b) Monopolies and Joint Monopolies

The Bill classifies monopolies and joint monopolies as reviewable trade practices. At the same time, it retains the availability of criminal sanctions for monopolies. The Advocate must choose between applying to the Board for a civil remedy and referring the matter to the Attorney General of Canada for criminal proceedings. "Monopoly" is defined as a situation where

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[16] Section 31.71(4).
[17] Section 31.71(5).
[18] Section 31.71(6).
[19] Section 31.71(7).
[20] S.C. 1973-74, c. 46.

one or more affiliated persons "substantially control," in an area of Canada, "a class or species of business in which they are engaged."[21] The scope of this definition is broadened by providing that substantial control can exist even if the monopolizing party accounts for less than fifty percent of that class or species of business.[22] The Board may issue a remedial order if it finds that a person is creating, entrenching or extending a monopoly by any of the following means: restricting entry into a market; foreclosing supply sources or sales outlets to a competitor; eliminating a competitor by predatory pricing or any other predatory practice; coercing a competitor into less competitive behaviour or disciplining him for past competitive behaviour; restraining economic activity in any other manner; breaching any of the prohibitions in part V of the Act; or engaging in a reviewable trade practice in a manner contrary to part IV.I of the Act.[23]

If the Board finds that a person is creating, entrenching or extending a monopoly through any of the listed abuses of market power, the Board may prohibit continuation of such conduct or direct him to take such action as the Board considers necessary to overcome the effects of such conduct. If either of these remedies is insufficient in the view of the Board to restore competition impaired by such conduct, then the Board may direct the offender "to dissolve the monopoly or reduce the degree of monopoly or to divest himself of such part of his business or assets as is prescribed in the order."[24] The Board may not make any order if the behaviour of the monopolizing party reflects "superior efficiency or superior economic performance," providing such behaviour only has the effect of restricting entry into a market or foreclosing supply sources or sales outlets to a competitor.

The Bill represents the first attempt to interfere with the economic power of oligopolies even if they have not engaged in the conspiratorial conduct prohibited by section 32.[25] The Bill defines "joint monopolization" as the attempt, by a small number of persons, to achieve "substantial control" in an area of Canada of "a class or species of business in which they are engaged by adopting closely parallel policies or closely matching conduct," which policies or conduct lead to the same non-competitive results that are not to be tolerated in the case of monopolies.[26] Whereas the term "monopoly" as used in the Bill does not connote improper behaviour, the term "joint monopolization" incorporates in its meaning the concept of wrongful behaviour. The Bill further provides that joint monopolization can be found even where "the parallel policies or matching conduct adopted by them was based on nothing more than a mutual recognition of their interdependence"

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[21] Section 31.72(1).

[22] Section 31.72(5).

[23] Section 31.72(2).

[24] Section 31.72(2)(e).

[25] See, *R.* v. *Canada Cement Lafarge Ltd.* (1973), 12 C.P.R. (2d) 12; *R.* v. *Armco Canada Ltd.* (1975), 21 C.C.C. (2d) 129; *R.* v. *Aluminum Company of Canada Ltd.* (1976), 22 C.P.R. (2d) 216. For a general discussion see, W. T. Stanbury and G. B. Reschenthaler, *Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases* (1977), 15 Osgoode Hall L.J. (forthcoming).

[26] Section 31.73(1).

and even in the absence of an agreement or arrangement among the participants.[27] If the Board finds joint monopolization, it may make orders similar to those available against offending monopolies. As is the case with monopolies, superior efficiency or superior economic performance constitutes an exemption from joint monopolization that exists only by virtue of behaviour having the effect of restricting entry into a market or foreclosing sources of supply or sales outlets to a competitor.

(c) Intellectual and Industrial Property

Section 29 of the Act presently provides that if the owner of a patent or trademark has made use of his exclusive rights and privileges in a particular manner to limit competition unduly the Federal Court of Canada may make a number of corrective orders. The Bill repeals this section and replaces it with section 31.74 which vests an expanded authority in the Board. Section 31.74 applies to a situation where a patent, trademark, copyright or industrial design is being used in a manner not specifically authorized by the legislation conferring the industrial property right, if the use is "likely to affect competition adversely in a market." The Board can make orders which declare a licensing arrangement unenforceable, direct the granting of licences to certain persons, or, if necessary, direct revocation of a patent or the expungement of other industrial property rights. This section would appear to be applicable to tied selling and exclusive dealing arrangements which might be forced on customers who feel compelled to do business with the owner of a particular patent. Such trade practices might not lead to an order under section 31.4, because in that section competition must be lessened "substantially." Section 31.4 contains other conditions as well, not repeated in section 31.74, which might further restrict the issuance of orders under that section.

(d) Interlocking Management

Section 31.75 of the Bill enables the Board to prevent a person from holding a directorship, or of being an officer, of a particular corporation if, by his holding a similar position in another unaffiliated corporation, the Board finds that competition in the production or supply of a product is likely to be substantially lessened or that competitors of the corporation are being, or are likely to be, foreclosed from supply sources or sales outlets.

(e) Specialization Agreements

Section 31.76 of the Bill allows for the approval of specialization agreements. "Specialization agreements" are defined in the Bill to mean agreements in which each party agrees to discontinue producing some article that he is currently producing on the condition that the other parties stop production of some other article. The definition also includes an agreement whereby the parties agree to buy exclusively from each other the articles which they stop producing. Specialization agreements can be advantageous to those who manufacture a wide range of products in insufficient quantities to produce all the products in the most cost-efficient manner. The Act indirectly prohibits specialization agreements by section 31.4 which regulates

[27] Section 31.73(3).

exclusive dealing and by section 32 which prohibits conspiracies to lessen competition unduly. Section 4.4 of the Bill exempts an allowed specialization agreement from these provisions of the Act.

Pursuant to section 31.76, the Board may allow a specialization agreement for up to five years if such agreement is likely to bring about substantial gains in efficiency of production by savings of resources for the Canadian economy, where these savings are not attainable in a manner less restrictive of competition. There is an additional prerequisite to approval: that the agreement has not been brought about by coercion. The Board may, pursuant to subsection 31.76(3), allow a specialization agreement on the condition that customs duties or other trade barriers applicable to an article subject to the agreement are reduced. If the proposed agreement is likely to eliminate, completely or virtually, competition in the market to which it relates, then the Board may only approve the agreement subject to conditions which have the effect of preventing the proposed agreement from lessening competition substantially. If one of the conditions of allowance is a series of reductions in customs duties over a period longer than five years, then the specialization agreement may be allowed for such period of time not longer than ten years and not longer than the period over which the series of reductions is to take place.

(f) Price Differentiation

Section 31.77 renders reviewable the practice of supplying an article at different per unit prices where different quantities are purchased from the supplier. Unless the differences in unit prices are considered by the Board to be based upon a "reasonable assessment of the difference in actual or anticipated cost of supplying customers in different quantities and under different terms and conditions of delivery,"[28] the Board may prohibit the practice if it finds that the practice is widespread or the supplier is a major supplier and that the practice is likely to substantially impede the expansion of an efficient firm or a firm that would, but for the practice, be a strong competitor in the market.

(g) Import and Export Restrictions by Affiliated Corporations

Section 31.61 of the Bill allows the Board to issue remedial orders if it finds that a corporation carrying on business in Canada has entered into an arrangement with an affiliate, carrying on business outside Canada, to substantially restrict the importation or exportation of a product into or from Canada, or has received a directive from its affiliate which, if implemented, would lead to a substantial restriction on imports or exports. The Board may only act if it is satisfied that the corporation accounts for twenty-five per cent or more of the Canadian production in the product and that the import-export restrictions are designed to protect price levels in Canada from imports or outside Canada from Canadian exports.

(h) Foreign Laws and Directives

The Bill proposes that section 31.6 of the Act be amended to allow the

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[28] Section 31.77(2).

Board to review conspiracies, wherever formed, that have an adverse effect in Canada "on competition, prices, quantity or quality of production or on distribution of product, or on conditions of entry into a trade, industry or profession."[29] At present, section 31.6 of the Act allows the Commission to issue an order only if the arrangement would, if entered into in Canada, be in violation of section 32.

3. *Competition Prohibitions*

The Bill proposes to amend the Act so that the formation of "mergers" is no longer a criminal offence. The Bill proposes additional minor amendments which affect to a limited degree other current prohibitions in the Act dealing with monopolies, price discrimination and predatory pricing. The Bill also proposes in section 32.11 to amend the criminal provisions of the Act dealing with foreign directives in a manner similar to the amendments described above for the civil procedure dealing with foreign directives.

(a) Import and Export Conspiracies

The Bill adds a new section 32.1 which would make it an indictable offence for anyone doing business in Canada to arrange with a person carrying on business outside Canada to restrict the importation of a product into Canada, restrict the exportation of products from Canada or otherwise adversely affect competition in Canada. This section would not have application to affiliated persons. This section would also not apply if the persons charged satisfy the Court they do not account for fifty per cent or more of the supply in Canada of the product which is the subject matter of prosecution.

(b) Systematic Delivered Pricing

The Bill provides in section 38.1 that it is an offence for a supplier of an article to refuse delivery to one of his customers at any location at which the supplier makes delivery to any other customer. Delivery must be on the same terms and conditions for sale and delivery that would be available to the first-mentioned customer if his business were located in that locality. This provision would allow an established customer of a supplier to take delivery at a location of another customer, at the appropriate cost for that locality, and then to make his own further transportation arrangements. Subsection 38.1(2) provides that a supplier may not refuse to deal with a customer merely because that customer insists upon taking delivery at a particular locality, other than his place of business, but at which the supplier delivers to other customers.

4. *Class Actions*

The Bill proposes to amend the Act by adding part V.1 which will provide for class and substitute actions. These actions would have application in a situation where each person in a group has a similar cause of action under section 31.1 of the Act against the same defendant. Section 31.1, which was added to the Act as part of the Stage I amendments, provides that

[29] Section 31.6(1)(b).

a person is entitled to recover damages if he has suffered loss as a result of conduct that contravenes one of the prohibitions in part V of the Act, or as a result of the failure of a person to comply with an order of the Commission. The class action allows one or more persons to conduct an action on behalf of all members of a class, other than those who specifically request exclusion, and to recover damages for distribution among the entire class. In certain circumstances, if a Court does not allow a class action to be maintained, the Advocate may institute a substitute action with damages accruing to the Consolidated Revenue Fund.

Any person wishing to create a class action must apply to the Trial Division of the Federal Court for an order that any proceedings he has begun in that Court may be maintained as a class action. Section 39.23 of the Bill provides for concurrent jurisdiction in the superior courts of any province which, through its attorney general, reaches agreement with the Attorney General of Canada on certain principles of administration and on the nature of a uniform set of regulations.

The Court must allow a class action to be maintained if it finds all of the following: the class is too large to allow a joinder of all members as party plaintiffs; common questions of law or fact are raised by the individual causes of action of the members of the class; the person who has commenced the proceedings will fairly represent the class; the proceedings are being brought in good faith on the basis of a *prima facie* case; and a class action is the best available method for the determination of the questions being raised between the members of the class and the defendant.[30] In determining whether a class action is the best method of adjudication, the Court is asked to consider two matters: first, whether the common questions of law or fact outweigh those questions affecting only individual members of a class; and, secondly, whether sufficient individual members of the class have suffered such a significant amount of loss to warrant the cost of administering the relief claimed in the proceedings. If the Court determines that a class action should not be maintained solely because the costs of administering relief is out of proportion to the individual damages suffered by the members of the class, then, and only then, can a substitute action be commenced.[31]

The Bill provides that the Court shall not refuse to permit a class action on the grounds only that separate contracts are involved, that damages may have to be calculated individually, or that compensation for loss is the only relief claimed. An order allowing a class action to be maintained must define the class involved, describe the nature of the claim, set forth the common questions of law or fact and specify a date by which members of the class may give notice of their desire to be excluded from the class action. If a Court finds against a defendant from whom compensation is sought, the Court must give judgment for each member of the class.[32] The Court may also grant any other relief within its jurisdiction that has been applied for and that the Court considers appropriate in the circumstances. The Court

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[30] Section 39.12(2).

[31] Section 39.14(1).

[32] Section 39.13(1)(a).

may determine the amount of compensation payable to each member of the class, or may order that such amount be determined in accordance with procedures to be contained in regulations to the Act or the rules of the Court.

The Advocate may commence a substitute action in the situation referred to above, only if the defendant has not been convicted of an offence against the Act and has not been subject to an order made under any of the provisions of part IV.1 on the basis of similar facts. The Advocate must commence his substitute action within six months after the Court refuses an application for the maintenance of a proceeding as a class action or before the expiration of the two year period governing damages in section 31.1 of the Act.[33]

Members of a class action may be notified of a class action at various stages in the proceedings. First, if the Court so orders the applicant must send notice to each member of the class purported to be represented that an application is being made for an order that certain proceedings be maintained as a class action. Secondly, after an order for maintaining a class action has been given, the Court may, by order, direct that members of a class receive notice of the proceedings, such notice also advising them of the date by which they must give notice to the Court of their wish to be excluded from the class action. If a Court does not order a notice of proceedings, a member of a class can disassociate himself from the class action by giving notice to the Court of his wish to do so at any time before judgment in the action.[34]

A class action cannot be discontinued or compromised without the approval of the Court that ordered it to be maintained. It is also noteworthy that costs are available only in limited circumstances. For instance, costs may be awarded on the original application to have the action maintained as a class action. Costs may also be awarded in proceedings that are based on facts similar to those on which the defendant was convicted of an offence against the Act. If members of a class have received judgment against a defendant, reasonable solicitor and client costs of the class members constitute a first charge on a *pro rata* basis against the compensation recovered by the class.[35]

B. COMMENTARY

1. *Mergers*

The Bill proposes a new method of dealing with mergers as a result of the generally acknowledged ineffectiveness[36] of section 33 of the Act in controlling those mergers that are of a detrimental nature. Since the inception of section 33, there has not been a single merger conviction after a full trial

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[33] Section 39.14(2).

[34] Section 39.17(1).

[35] Section 39.2(2).

[36] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) at 190. See also, W. T. Stanbury, *Penalties and Remedies Under the Combines Investigation Act 1889-1976* (1976), 14 Osgoode Hall L.J. 571.

that has not been subsequently reversed.[37] This enforcement record is not evidence of a lack of merger activity in Canada or of any national good fortune in having only mergers that increase competition. This record is attributable to the combination of (i) the narrowly construed definition of merger in the Act which requires the lessening of competition to be "to the detriment or against the interest of the public";[38] and (ii) the criminal law framework established by section 33 of the Act which necessitates proof beyond a reasonable doubt.

The use of civil law remedies for mergers was recommended by the Economic Council of Canada[39] and the Skeoch-McDonald Report and was included in Bill C-256. The primary test set out in Bill C-42 of whether a merger "lessens or is likely to lessen, substantially, actual or potential competition," is similar to the wording used in Bill C-256: "as resulted, is resulting or is likely to result in significantly less competition than would have existed or would be likely to exist."[40] The language used in the Bill is also consistent with the language added in the Phase I amendments to the Act, which provide that substantial lessening of competition is needed before the Commission can make an order respecting exclusive dealing, tied selling or market restriction.[41] The Skeoch-McDonald Report suggested in its draft legislation that the determinant be whether the merger "is or would be contrary to the public interest."[42] The Bill has opted against such general language.

The Bill has excluded from its purview horizontal mergers which result in less than twenty per cent of a market accruing to the merged parties after merger. This provision contrasts with the all-encompassing registration procedure for mergers that was to be established under Bill C-256. Section 31.71 of the Bill recognizes that not every merger should be subject to review. However, by choosing twenty per cent as a stationary boundary, the Bill sacrifices the theoretical objective in the Skeoch-McDonald Report, of subjecting only "significant"[43] mergers to review, for the practicality of a more readily identifiable threshold.[44]

The Skeoch-McDonald Report states that the policy of the Board should be (1) to permit the growth of firms "based on real-cost economies, including static economies of scale, but emphasizing those advantages relating to technological progress, product variation and organizational change; and (2) to discourage expansion of firm size (or maintenance of firm size against new

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[37] See, *R.* v. *Canadian Breweries,* [1960] O.R. 601; 104 C.C.C. 39; *R.* v. *British Columbia Refining Company Ltd.* (1960), 32 W.W.R. (N.S.) 577; (1962), 39 C.P.R. 177.

[38] Section 2.

[39] Economic Council of Canada, *supra,* note 36.

[40] *Supra,* note 3, section 34(1).

[41] *Supra,* note 2, section 31.4.

[42] *Supra,* note 4 at 124.

[43] *Id.* at 79.

[44] Many of the changes in Bill C-42 relative to Bill C-256 (and as compared with the Skeoch-McDonald proposals) are a response to the complaints by business that Bill C-256 gave excessive and unguided discretionary power to its administrators.

entrants) which results from the exploitation of artificial restraints."[45] Examples of artificial restraints from which merging companies may seek to benefit are the possession of scarce natural resources; the possession of patents or licences; and the use of discriminatory reciprocal arrangements between large firms and firms in preceding and succeeding stages in the structure of production or distribution. Accordingly, the Skeoch-McDonald Report advocates a balancing by its Board of the detrimental creation or enhancement of artificial restraints against the beneficial occurrences of real-cost economies or the minimization of other artificial restraints. The Bill has basically adopted these principles as is evidenced by the preamble and the exemption available to a merger which brings about substantial gains in efficiency. However, the Bill deviates from the balancing approach by judging a merger in terms of competition and by creating an outright exemption where substantial gains in inefficiency are made, provided that the merger does not result in a monopoly.

The Bill directs the Board to consider a list of factors in determining whether competition is substantially lessened. This list is reminiscent of and virtually the same as the factors set out in subsection 34(4) of Bill C-256. Specifically, each factor in Bill C-256 is repeated and only paragraphs (a), (h), (k), (l), (m) and (n) of subsection 31.71(4) of the the Bill are new. These paragraphs deal principally with the availability of substitute products, the removal of an effective competitor, the extent of innovation in the market and the likelihood that competition will be stimulated. Bill C-256 clearly stated that its tribunal could consider other factors than the ones listed. The Bill implies that the Board is limited to the factors listed. Such a limitation appears to be inconsistent with the extensive discretion which has otherwise been given to the Board and the responsibility placed on the Board to oversee the well-being of the Canadian economy.

The Skeoch-McDonald Report states that because our economic structure is complex, the evaluation of mergers cannot be done by simple yardsticks. In order to give the Board the scope to make the correct decision in the particular circumstances, the rules must be what some might consider complex and imprecise.[46] The Bill has managed to remove some of the uncertainty contained in the draft legislation of the Skeoch-McDonald Report but the complexities remain.

Because the Bill provides that determinations pursuant to the *Foreign Investment Review Act* are to be ignored for the purposes of the Act, a foreign investor in Canada may find himself subject to review by both the Board and the Agency. This possibility further complicates the picture for the foreign investor. He may be faced with the prospect of negotiating terms with the Advocate to obtain a pre-merger clearance while, at the same time, negotiating undertakings with the Agency. In addition, a dual review introduces the possibility that a merger considered to be of significant benefit to Canada by the Federal Cabinet, and accordingly allowed, might be prohibited by the Board because of a likelihood of substantial lessening of competition. Although one may rationalize that the two pieces of legislation have different

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[45] *Supra,* note 4 at 72.

[46] *Id.* at 89.

objectives and that inconsistent decisions should therefore be tolerated, it seems inherently objectionable to create a situation whereby the public may perceive that its Federal Cabinet has been overruled by an administrative tribunal. Subsection 2(2) of the *Foreign Investment Review Act* sets out five groupings of factors which are to be taken into account in determining whether or not an acquisition by an ineligible person will result in significant benefit to Canada. Two of these sets of factors[47] are also factors relevant in the review of mergers by the Board. Accordingly, a decision by the Board that prohibits a merger allowed by the Cabinet may, in fact, constitute a reversal of a Cabinet decision respecting the effect of the merger on competition within Canada.

2. *Monopolies and Joint Monopolies*

The Bill's provisions respecting monopolies constitute an elaboration of the provisions set out in Bill C-256.[48] In particular, there is a clearer attempt to define and control the possible abuses of monopoly power and, also, a recognition that allowance must be made for behaviour that reflects superior efficiency. The Bill appears to have been influenced greatly by the recommendations of the Skeoch-McDonald Report. However, there are many differences from the Report worth noting. Most of these result from an attempt in the Bill to make specific policy decisions that the Skeoch-McDonald Report considered too dangerous to make given the complexities of our economic society. For instance, rather than define monopoly in terms of a capability to choose its own rate of profits without fear of competition,[49] the Bill defines monopoly in terms of substantial control of business, which may exist under the Bill with less than fifty per cent of the market.

Subsection 31.72(2) forces the Board to choose between prohibiting an offending monopolist from continuing his course of conduct, and directing him to take action that will restore competition that has been impeded by such conduct. This choice seems unreasonable and is in conflict with subsection (2) of the Skeoch-McDonald Report's draft legislation regarding the "Misuse of Dominant Position."[50] That draft legislation contemplates the use of a prohibition order together with other remedies.

Subsection 31.72(4) exempts an offending monopolist if his behaviour results from superior efficiency or superior economic performance and has

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[47] Section 2(2) of the *Foreign Investment Review Act*, S.C. 1973-74, c. 46 reads, in part, as follows:

> In assessing, for the purposes of this Act, whether any acquisition of control of a Canadian business enterprise or the establishment of any new business in Canada is or is likely to be of significant benefit to Canada, the factors to be taken into account are as follows:
> (c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
> (d) the effect of the acquisition or establishment on competition within any industry or industries in Canada;....

[48] *Supra*, note 3, sections 37 and 41.

[49] *Supra*, note 4 at 156.

[50] *Id.*

only limited detrimental effects on competition. This exemption would appear to be too restrictive when one considers that it does not specifically apply if the behaviour of a monopolizing party comes within the catch-all provision of "restraining economic activity in a manner otherwise than as described in subparagraphs (i) to (iv)."[51] As was the case with the regulation of mergers, the Skeoch-McDonald Report recommends an approach that calls for a balancing of detrimental artificial restraints implicit in any conduct against gains in efficiency. The Bill has determined for the Board in subsection 31.72(4) that no amount of real-cost economies can be used to justify the behaviour of a monopolizing party that has the effect of "restraining economic activity in a manner otherwise than . . . ."[52] This legislative handcuff on the Board's power to acknowledge superior efficiency seems inconsistent with the reliance the nation must otherwise place with the Board respecting its use of its broad discretionary powers.

The Skeoch-McDonald Report also recommends that the power to dissolve a monopoly should only be available if the Board has previously made an order with respect to that monopoly. The Bill allows the Board to order divestiture at any time if the Board determines that this form of corrective action is necessary to stimulate or restore competition in a relevant market. Is not divestiture too strong a remedy to force on a defendant who could prove the Board wrong, and by some other means be able to restore competition to a market?

The Bill's provisions relating to joint monopolization are likely to be the most contested in the legislation. First, these provisions do not result from any specific recommendations in the studies that the Department of Consumer and Corporate Affairs commissioned in 1975. The Economic Council of Canada was content with regulating even monopolies by monitoring only those specific abusive trade practices that are associated with monopolies. The Skeoch-McDonald Report did not choose to expand its discussion on monopolies to include oligopolies. Pursuant to the provisions of Bill C-256, two or more persons could be considered in a monopoly position if they were "acting in concert or apparently in concert."[53] "Acting in concert" implies an arrangement. Subsection 31.73(3) of the Bill clearly states that an arrangement is not necessary to prove joint monopolization. All that must exist under the Bill to condemn the similar policies or conduct is a mutual recognition of interdependence by the parties. The joint monopolization provisions of the Bill could create great uncertaintly in the number of industries in Canada where large competitors adopt similar policies because they are dealing with the same unions, same suppliers, same products and same markets, and are therefore reacting to the same stimuli.

The remedies for joint monopolization, including divestiture, set out in paragraph 31.73(2)(c) of the Bill would appear to be poorly conceived because they are merely a verbatim repetition of the remedies provided for

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[51] Subparagraph 31.72(2)(a)(v).

[52] *Id.*

[53] *Supra,* note 3, section 41.

offensive monopolies. Surely one does not remedy joint monopolization by directing one of the parties "to dissolve the monopoly."[54]

3. *Class Actions*

The provisions of section 31.1 of the Act, which are of questionable constitutional validity,[55] are by themselves of little practical assistance to consumers, when one considers that the losses likely to be incurred by any one individual from a breach of the Act would very often not justify bringing legal action. Only by combining forces can consumers ever hope to be in an economic position to maintain to conclusion even the most clear cut and justifiable action. The Bill therefore introduces the class action. The Bill also recognizes that in some situations even a class action is not a feasible means of fairly compensating each wronged member of the class for his damages. For instance, if each of three million people has suffered a loss of fifty cents, the cost of confirming the members of the class and arranging for their compensation could wipe out any damages available for distribution. Therefore, the Bill provides for the substitute action which is intended to deter a potential defendant from following a particular course because he perceives that individual members of a class will not suffer sufficient damages to justify even a class action.

The substitute action is not available under the Bill if the potential defendant has been subject to an order under part IV.1 of the Act or has been convicted of an offence against the Act based on similar facts. One must therefore question whether the substitute action is of any real significance. One would expect that the usual sequence of events under the amended Act, when a breach occurs, will be first a conviction or order and then the initiation of a class action. If the class action is not allowed to be maintained the alternative of a substitute action is no longer available. If the Advocate recognizes a situation where a class action would not be allowed to be maintained, but the overall damages suffered by the class are significant, what should he do? It is questionable whether he should or could delay criminal prosecution or an application to the Board while awaiting the commencement of a class action that he anticipates will be refused maintenance on a ground which will allow for a substitute action.

The Bill does not clearly define the position of other members of a class once one member has been denied the maintenance of a class action. Does each member of the class have a right to try to prove a *prima facie* case, or are there situations in which a refusal is binding on all members of the class? One would assume that if one member has been denied the right to maintain an action because he would not fairly represent the interests of a class, then other members should be free to apply for maintenance of a class action. One would also assume that if a member has been unsuccessful because the ques-

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[54] Paragraph 31.73(2)(c).

[55] This question is discussed in, Bruce C. McDonald, *Constitutional Aspects of Canadian Anti-Combines Law Enforcement* (1969), 47 C.B.R. 161; P. W. Hogg and W. Grover, *The Constitutionality of the Competition Bill* (1976), 1 Canadian Business Law Journal 197.

tions affecting individual members predominate over the common questions of law or fact, then other members of the class should not be able time and again to apply for maintenance of a class action. The Bill should provide a mechanism for limiting the number of applications that can be brought against a defendant to review the same facts. Otherwise, there is even a risk that a class action might be allowed even after a substitute action had begun. The Bill now provides that, if a Court refuses an order to maintain a class action, reasons for such decision must be given. Perhaps those reasons will clearly specify whether the decision was based on a point which is of general significance to other members of the class who might otherwise be interested in applying for maintenance of a class action.

The Bill has some built-in deterrents to frivolous class actions. First, there is the application to Court which must show good faith on the basis of a *prima facie* case. Secondly, there is the aspect of costs. If the application is refused, costs may be awarded against the applicants for the defendant's legal expenses. Therefore, even if a member of a class hires a lawyer on a contingency fee basis, he must still consider the risk of being responsible for the costs of the defendant if he loses the application.

The matter of costs must also be considered by a plaintiff who is successful on his application but might be unsuccessful in the result of the class action. Unless the defendant had been previously convicted of an offence against the Act on similar facts, the plaintiff will not even be eligible to have costs awarded against the defendant. Therefore, the plaintiff may choose to limit his downside risk by hiring a lawyer who will conduct the action on a contingency fee basis. The contingency fee is allowed, subject to regulation, in Alberta, British Columbia, Manitoba, New Brunswick, Northwest Territories, Nova Scotia and Quebec, but not in the other Canadian jurisdictions.[56] It will be interesting to watch the interaction between the provincially-controlled contingent fee and the federally-based class action under the Bill.

Paragraph 39.2(1)(d) allows costs to be awarded in class action proceedings based on substantially the same facts on which the defendant was convicted of an offence against the Act. This provision should be expanded to include certain situations in which there is an order under part IV.1 of the Act against the defendant. Otherwise, class action plaintiffs who have suffered losses resulting from an offending monopoly would be prejudiced as to costs if the Advocate applied to the Board pursuant to section 31.72 rather than referring the matter to the Attorney General of Canada for prosecution under section 33.

The draftsmen intended to give some meaning to section 31.1 by incorporating the class action provisions into the Act, but at the same time failed to provide any guidelines with respect to the calculation of damages. They seem oblivious to the fact that the vast majority of competition policy violations occur at levels in the chain of distribution so remote from consumers that it is virtually impossible for them, either individually or as a class, to

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[56] Canadian Bar Association, Code of Professional Conduct (Ottawa: Canadian Bar Association, 1974) at 42.

prove that they suffered any compensable injury at all, much less the amount of their alleged damages. The farther one moves from horizontal price-fixing the more problematical and difficult it becomes to prove injury to consumers. Even where a clear violation of section 32 of the Act can be proved, an appraisal of the resultant economic effects on industry structure involves many imponderables. Consequently, behaviour which tends to lessen competition cannot readily be shown to have a measurable effect on price, much less a specific impact on individual consumers. The impossibility of showing compensable harm to consumers from a merger becomes even more obvious when one considers vertical acquisitions and, *a fortiori*, market extension mergers which involve at most the elimination of potential competition.[57]

C. CONCLUSION

The Bill proposes a number of significant and controversial amendments to the Act, the majority of which reflect the shift, exemplified by the Stage I amendments, toward a civil law approach to competition legislation. The Bill's proposals are of such great consequence to the future of Canadian industrial society that one can expect much study and debate in Parliament and the community before the Bill receives Royal Assent.

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[57] For further discussion of this problem see, Milton Handler and Michael D. Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach* (1976), 85 Yale L.J. 626.